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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2052

W. KENNETH POPE, ET UX,
Petitioners,

v.

THE STATE OF TEXAS, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL
DISTRICT OF THE STATE OF TEXAS

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PETITION FOR A WRIT OF CERTIORARI
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DISTRICT OF THE STATE OF TEXAS

Petitioners W. KENNETH POPE and wife, KATE S. POPE pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of the State of Texas rendered in this case on October 17, 1973.

OPINION BELOW

The unreported opinion of the Court of Civil Appeals appears in Appendix, p. 4. No opinion was rendered by the Supreme Court of Texas.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on October 17, 1973, Appendix, p. 10, and the Popes' Motion for Rehearing was overruled on November 7, 1973, Ap-

pendix, p. 11. On March 6, 1974 the Supreme Court of Texas denied the Popes' Application for Writ of Error to the Court of Civil Appeals with the notation "Refused. No Reversible Error", and on April 24, 1974 overruled the Motion for Rehearing on the Application for Writ of Error, Appendix, p. 12. The Application and each Motion were timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Since the Supreme Court of Texas denied the Application for Writ of Error, certiorari is properly directed to the Court of Civil Appeals as "the highest court of a state in which a decision could be had". 28 U.S.C. § 1257(3); *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U.S. 672 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954). Judgment was not final until the order entered on April 24, 1974 denying Motion for Rehearing on Application for Writ of Error.

QUESTIONS PRESENTED

The State of Texas contracted for the County of Harris to acquire right of way, including the Popes' land, for a federal highway. The State determined the market value of the Popes' land to be $146,800 and the County offered and the Popes refused this sum. At the trial the County did not present evidence of the approved market value but presented testimony of an appraiser, whom the State refused to employ, of a market value of $75,000 (51% of the approved value).

1. Was the suppression or non-disclosure by the State of Texas (through the County) at the trial of evidence of the State-approved market value and the presentation of the market value opinion of $75,000 a denial of due process of law under the Fourteenth Amendment to the Popes?

2. Does the mandate of the Fifth Amendment that private property shall not be taken for public use without just compensation, as adopted by the due process clause of the Fourteenth Amendment, require a State in the trial of a condemnation suit to present evidence of the price it has determined to be the market value of the property being taken?

3. When the laws of a State compel a condemning agency, as a condition precedent to vesting jurisdiction of a condemnation proceeding in a court, to offer the owner of land to be acquired the price determined by the agency to be market value, is it a denial of due process of law for such agency, after vesting jurisdiction in the Court by making the required offer, to suppress evidence of such price and present evidence that the market value is fifty-one percent of its determined market value?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

Constitution of the United States, Amendment V:

> ". . . Nor shall private property be taken for public use, without just compensation . . ."

Article 1, Section 17, Texas State Constitution:

> "No person's property shall be taken . . . for or applied to public use without adequate compensation being made . . ."

Portions of Articles 3264, 3265, 3266 and 3268, Revised Statutes of Texas, 1925, as amended, explain condemnation

procedure in Texas and for this purpose are included in the Appendix, p. 1-3:

STATEMENT OF THE CASE

Summary

W. Kenneth Pope and wife, Kate S. Pope, owned a tract of land situated in the southwest quadrant of the City of Houston, Harris County, Texas. The State of Texas, through the Texas Highway Department (Department), determined the necessity to acquire 4.21 acres of the Pope land as right of way for the Southwest Freeway (U.S. Highway 59). The Department and the County of Harris (County) executed a contract providing for the County to acquire the right of way, for the State to reimburse the County for part of the acquisition costs, and for the State to determine the value of properties to be acquired. (N.27-30, DX. 4)[1]

The State determined the market value of the Popes' property to be $146,800 and the County offered and the Popes rejected this sum. Condemnation special commissioners returned an award of $165,134.70. The Popes appealed to court, the County presented evidence by an appraiser that the State refused to employ that the property had a market value of $75,000 (51% of the approved market value), the witness for the Popes testified to a value of $220,000, and the jury returned a verdict of $155,960. Judgment rendered on the verdict was affirmed by appellate courts of Texas.

The Condemnation Proceeding

On December 9, 1958, the Chief of the Right of Way Department of the County offered the Popes the sum of

[1] The record consists of a transcript of filed documents (T), transcript of trial testimony (R), transcript of testimony at the hearing on motion for new trial (N) and documentary evidence of the State (PX) and the Popes (DX).

$146,800 for their 4.21 acres of land (DX. 7). The offer was declined, and in accordance with Texas condemnation procedure the State and County filed a petition in condemnation with the judge of the County Civil Court at Law No. 1 of Harris County, (T. 3). Article 3264. Appendix, p. 1. The judge appointed special commissioners who held a hearing and awarded the Popes the sum of $165,134.70 as the market value of the property on January 30, 1959, (T. 8).

The Popes filed objections with the judge and the proceeding became a civil case in the County Court at Law, (T. 13). Article 3266 Appendix, p. 2. On March 6 the County deposited the sum of $165,134.70 in the registry of the Court to obtain the right to take possession of the land and this became the date of taking. Article 3268, Appendix, p. 3. Thereafter the Popes withdrew this sum, (T. 37). The acceptance of the money eliminated all issues except the market value of the tract taken and damages to the remainder. *State* v. *Jackson,* 388 S.W.2d 924 (Tex. Sup. 1965).

Trial was delayed by extended title litigation, but the case was called for trial before a jury on March 20, 1972, and by motion the Popes admitted that the sole issue in the cause was the market value of the part taken (T. 16). Having the right to open and close the evidence, the Popes presented the testimony of V. P. Ringer, an independent fee appraiser, that the market value of the property was $220,180.11, (R. 23).

Mr. Ringer had been in the real estate business since 1928 and had engaged in real estate mortgage loans, brokerage, property management and appraising. Mr. Ringer was a member of the Houston, State and National Board of Realtors, Society of Real Estate Appraisers, Society of Real Estate Counsellors and American Institute of Real

Estate Appraisers and held from these organizations the designations of Senior Real Estate Analyst, C.R.E. and Member of the Appraisal Institute. His past offices included Chairman of the Texas Real Estate Commission (State agency regulating real estate brokers), member of the Planning Commission of the City of Houston, President of the Houston Board of Realtors, President of the local chapter of the American Institute of Real Estate Appraisers and President of the local chapter of the Society of Real Estate Appraisers. He currently was a member of the Governing Council of the American Institute of Real Estate Appraisers. (R. 5-19).

After the Popes rested the State presented the testimony of Mr. H. F. Finley that the market value of the Pope land was $75,000 (51% of the approved value and offer of $146,800), (R. 329). No other witnesses were presented.

The jury found that the market value of the tract on March 6, 1959 was $155,960 (T. 35), the trial court rendered judgment awarding the State the amount by which the award of the Special Commissioners exceeded the verdict ($9,174.70). (T. 37-42). The Popes filed and trial court overruled a Motion for New Trial (T. 79).

Hearing on Motion for New Trial

By assignment of error in their Motion for New Trial the Popes assailed the verdict and judgment on the ground that the procedure employed of suppressing evidence of the approved market value and presenting an opinion of $75,000 deprived them of due process of law in violation of the Fourteenth Amendment to the Federal Constitution. (T. 52). Appendix, p. 13.

The following facts were presented at the hearing on the Pope's Motion for New Trial by William L. McClure,

Urban Administrative Engineer of the Houston District of the Texas Highway Department, E. E. Schwenke, Chief of the Right of Way Department of Harris County, and the Assistant County Attorney handling this suit.

On September 26, 1957 and August 5, 1958 the Department and the County contracted for the County to acquire right of way for the Southwest Freeway (U. S. Highway 59) in the City of Houston, for the State to reimburse the County for part of the acquisition costs, and for the State to determine the values of properties to be acquired. (N. 27-30, DX. 4). The contract was made in accordance with the Right of Way Manual of the Department, (DX. 3). The Manual provides for a determination of an approved market value of properties to be acquired, and for that purpose provides the procedure for employing appraisers, the contents of appraisal reports, and the method of review of appraisal reports by a District and the State Right of Way Engineer. (DX. 3, N. 27-30).

In accordance with the Manual the Houston District appointed Robert Winstead and Thomas H. Bearden to appraise the Pope property. (N. 9, 10, 67). Winstead rendered a market value opinion of $128,450 and Bearden one of $146,800. (DX. 1). After review of the appraisal reports the Houston District approved the Bearden report and opinion and sent the appraisal reports of each to the Right of Way Division of the Department in Austin (the capital) which reviewed the appraisal reports and approved the recommendation of the District of an approved market value of $146,800. (N. 10-13, 48).

The District transmitted the "recommended compensation" of $146,800 and the appraisal report of Bearden to the County with the advice that Bearden was the "selected appraiser". (DX 2, 8). The Chief of the County Right of

Way Department requested authority to offer $146,800 to the Popes and to bring a condemnation proceeding if this price was not accepted. (DX. 7). The Commissioners Court (governing body of the County) approved this request. As noted above, an offer of $146,800 was made and refused.

At a time not established in the record, by letter the County asked the District to employ Mr. H. F. Finley to appraise the Pope land. The State refused. (N. 26, 27, 47). On February 26, 1959, about six months after receiving the State approved market value and 44 days after filing of this proceeding, however, the County employed Finley to appraise the Pope land. (N. 72).

(At the trial the State did not call Bearden or Winstead as a witness or present evidence of the State approved market value of $146,800. Finley was the only witness called by the State.)

The decision to present Finley as a witness and to not present other witnesses or evidence of the State approved market value was made by the Assistant County Attorney who tried the case. (N. 70-72). He testified that the Pope case was assigned to him in the latter part of 1970, that the case was set for trial (not the setting at which the case was tried), and that on December 21, 1970 (more than one year before the trial in March, 1972) he talked to Bearden by telephone and "found that Mr. Bearden was not available to testify". (N. 70-73). The Assistant County Attorney did not call Bearden or Winstead to testify at the hearing.

There is no evidence that Bearden was not available to testify in March, 1972. At the hearing Mr. Schwenke testified that he knew Mr. Bearden and thought that he was still engaged in the appraisal business in March of

1972. (N. 66, 67). The file in the District showed that Winstead and Bearden appraised the Pope property for the State and the file was available for review by anyone from the County. (N. 47, 48). The Assistant County Attorney did not examine the District file. He talked to McClure by telephone concerning the Pope property but did not ask whether the State had the property appraised by other appraisers. (N. 74, 75).

Preservation of Errors

There is no evidence that prior to or during the trial the Popes knew of the Bearden appraisal, his opinion, or the approved market value. Prior to the trial the Popes could not have obtained by discovery or otherwise the names of the State appraisers, the State-approved-value or the reports of appraisers, and could not have obtained any of this information during the trial.[2] If the Popes had learned the identity of a State appraiser, they could have called him as their witness but could not have disclosed his employment by the State. *State* v. *Biggers,* 360 S.W. 2d 516 (Tex. Sup. 1962).

The Appeal

The Popes duly perfected an appeal to the Court of Civil Appeals from the judgment and order overruling

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[2] *Boyles* v. *Houston Lighting & Power Co.*, 464 S.W.2d 359, (Tex. Sup. 1971); *Ex Parte Hanlon,* 406 S.W.2d 204 (Tex. Sup. 1966); *Ex Parte Ladon,* 325 S.W.2d 121 (Tex. Sup. 1959); *Dallas Railway & Terminal Co.* v. *Oehler,* 296 S.W.2d 757 (Tex. Sup. 1957); *State* v. *Ashworth,* 484 S.W.2d 565 (Tex. Sup. 1972); *Shirley* v. *Dalby,* 384 S.W.2d 362 (Tex. Civ. App. 1964, writ ref., n.r.e.); *City of Houston* v. *Autrey,* 351 S.W.2d 948 (Tex. Civ. App. 1961, writ ref., n.r.e.); *Hodges* v. *State,* 403 S.W.2d 207 (Tex. Civ. App. 1966, writ ref., n.r.e.); *Lapsley* v. *State,* 405 S.W.2d 406 (Tex. Civ. App. 1966, writ ref., n.r.e.).

their Motion for New Trial. Point of Error No. One in their Brief in that Court asserted that the verdict and judgment were obtained by fraud and in violation of the Fourteenth Amendment because of the suppression of the approved market value of $146,800 and presentation of the opinion of $75,000. Appendix, p. 16.

While recognizing that the appraisal by which the State determined the approved market value was relevant to the offer that would be made in negotiating for purchase, the Court of Civil Appeals held that it was not a suppression of evidence at the trial to fail to call such appraiser and that it was not a denial of due process for the State to fail to present evidence of its approved value or to call as a witness the appraiser whose opinion was adopted as the approved value. In Grounds One, Two, Three, Four and Six of the Pope's Motion for Rehearing the holding of the Court of Civil Appeals was attacked as depriving the Popes of due process of law in violation of the Fourteenth Amendment. Appendix, p. 16.

The Court of Civil Appeals overruled the Motion for Rehearing, Appendix, p. 11, and in Points One, Two, Three, Four and Six of their Application for Writ of Error to the Supreme Court of Texas the Popes asserted the denial of due process of law from the procedure employed in suppressing evidence and presenting the opinion of Finley. Appendix, p. 18. The Application was overruled, Appendix, p. 12, and the same assignments of error were presented in the Pope's Motion for Rehearing, which was also overruled. Appendix, p. 21.

REASONS FOR GRANTING THE WRIT

1. The Public Importance of the Issues Presented

The Due Process Clause incorporates the Fifth Amendment and imposes upon the States the obligation to pay just compensation for the taking of private property. *Chicago, B & Q.R.R.* v. *City of Chicago,* 166 U.S. 226 (1897). "Just compensation" means the full and perfect equivalent in money of the property taken. *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326 (1893). This Court early established the concept of "market value" as the equivalent. The owner is entitled to the market value of his property at the time of the taking. *Almota Farmers Elevator & Whse. Co.* v. *United States,* 93 Sup. Ct. 791, 794 (1973). The word "just" in the Fifth Amendment evokes ideas of "fairness" and "equity". *United States* v. *Fuller,* 93 Sup. Ct. 801, 803 (1973). Due process is FAIR PLAY. The issue presented by the holding of the Court of Civil Appeals is whether when a State becomes a litigant in eminent domain, fair play requires it to subordinate that role to its duty as a government to a citizen, or leaves it free to pursue a "win at any cost" attitude.

While recognizing that the price determined by the State of Texas to be the market value of the Pope property was relevant to the duty of the State to negotiate in good faith with the Popes prior to condemnation, the Court of Civil Appeals held that it was not a taking of property without due process of law for the State to suppress evidence of its approved market value and to present evidence of a price equal to 51% of the approved value (by a witness whom the State refused to employ).

The question of the scope of the duty of the State of Texas in the trial of a condemnation proceeding is applicable to the United States and the other 49 states and is

a substantial federal question which has not heretofore been determined by this Court.

The laws of a majority of the states (including Texas) require a bona fide effort to purchase as a condition to filing condemnation proceedings and require that the effort to buy be in good faith. 6 Nichols, The Law of Eminent Domain (3rd Ed.) p. 82, § 24.62 [1]; 29 C.J.S. p. 998-1001, Eminent Domain, § 224, (1); *City of Houston* v. *Derby,* 215 S.W.2d 690 (Tex.Civ.App. 1948, writ ref'd). While there has been little discussion on the question, it has been held that a bona fide effort to purchase involves a willingness to pay the market value of the land. *In re Rogers,* 220 N.W. 808 (Mich. Sup. 1928). In the absence of such a requirement by a constitution or statute, it is held that an attempt to purchase is not a condition precedent to the commencement of a condemnation proceeding. 6 Nichols, The Law of Eminent Domain, p. 81, § 24.62; 29 C.J.S. 997, Eminent Domain, § 224(1).

In the large number of states requiring an offer to pay the price determined to be the market value of land to be taken as a condition to vesting jurisdiction in the hearing agency, is it consistent with due process and the obligation to pay just compensation for such a state to offer its approved market value and then as a litigant suppress evidence thereof and present evidence of a much lower value? And in a state where there is no requirement of negotiation, does such a state have the right at the trial to suppress its determined market value in an effort to procure the land for less than its reasonable value? This federal question has not been decided by this Court, and no direct holding thereon by any court has been found.

An additional problem is presented in Texas and other states having similar condemnation procedure. Art. 3266,

Tex. Rev. Stat. 1925 authorizes a condemning agency to take possession of the land sought upon depositing a sum equal to the award of Special Commissioners into the registry of the court. Withdrawal of the sum by the owner eliminates the issue of good faith effort to agree and all other issues except the amount of compensation. *State* v. *Jackson,* 388 S.W.2d 924 (Tex. Sup. 1965). If the deposit is not withdrawn the condemning agency has the burden of proof on every issue except compensation. In such a case the condemnor will have to introduce evidence of its approved market value to establish a good faith effort to purchase. Unless the Fourteenth and Fifth Amendments prevent suppression of the approved market value, if the owner has withdrawn the money, the condemning agency may select its own price to place in the evidence, as it did in the instant suit.

The few cases even touching the area of the issues presented here emphasize the need for decision from this Court. In regard to an offer to purchase, it has been said that the Fifth Amendment does not "prevent the United States from making an advantageous bargain with a landowner provided, of course, that it does so in a fair, honest and aboveboard transaction". *Harney* v. *United States,* 306 F.2d 523 (C.A. 1 1962) cert. den. 371 U.S. 911 (1962); *United States* v. *229.34 Acres of Land,* 246 F.Supp. 718 (D. C. Ind. 1965). It is difficult to conceive how, in a fair, honest and above-board transaction with a landowner, the United States can make *an advantageous bargain.* A claim that a failure to negotiate in compliance with 42 U.S.C. § 4651 violated the Fifth and Fourteenth Amendments has been characterized as "frivolous" because due process does not extend to such negotiation procedures but only affords notice and hearing. *Barnhart* v. *Brinegar,* 362 F.Supp. 464 (W.D. Mo. 1973). Does due process extend to presentation of evidence in court?

The Congress has also approached but not touched the issue of the duty of government in court in a condemnation proceeding. The Federal-Aid Highway Act of 1968, 82 Stat. 820, (P.L 90-495, § 35), amended 23 U.S.C. § 101 to provide that before approving any project the Secretary must obtain from the State assurance that before initiating negotiations to purchase it would establish an amount believed to be just compensation and "make a prompt offer to acquire the property for the full amount so established". This Congressional interpretation of just compensation has been carried forward in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1904, 42 U.S.C. § 4651, § 4655. The House Report on the Act (U. S. Congressional & Administrative News, 1970, p. 5871) deplores policies of "take it or leave it" and acquisition of property at an amount below its approved appraisal practised by Federal agencies. The Report equates the requirement of an offer of an agency's approved value to due process of law:

> "Any policy which does not entitle the property owner to an offer of the full amount of the agency's approved value estimate, where the owner must sell, is unfair. It is fundamental that all citizens should be dealt with fairly by their government."

The United States, the 50 states and their citizens whose property is taken need affirmation by this Court that all citizens will be dealt with fairly by their governments in court.

In deploring negotiation practices of some governments to buy as cheaply as possible and discovery procedures immunizing government appraisal reports, the commentators have also approached the problem of the duty of government in court. 5 Nichols, The Law of Eminent Domain, (3rd Ed.) C.H. XXIII-a, Rohan, *The Condemnor's*

Duty to Pay its Full Appraisal; Slavitt, *Inequities and Injustices of Condemnation Acquisitions,* 40 Conn. B.J. 11 (1966); Slavitt, *More Inequities and Injustices of Condemnation Acquisitions,* 43 Conn. B.J., Vol. 43, No. 1 March, 1960; Varney, *The Use of Prior Appraisals in Condemnation Cases,* 1968 Report, Committee on Condemnation and Condemnation Procedure, A.B.A., p. 377.

Section 303 of the Eminent Domain Procedure Act recommended by the State Commission on Eminent Domain of New York requires a condemnor to establish an amount believed to be just compensation and to make an offer for an amount not less than the highest estimation in the condemnor's appraisals and provides that "the condemnor's offer shall be admissible in evidence in any proceeding to determine just compensation". 1972 Report of Committee on Condemnation and Condemnation Procedure, A.B.A., p. 256.

In a few decisions on the right of an owner to discover appraisal reports of the condemnor or to require testimony of its witness, the duty of government to be fair as a litigant has been emphasized. It is said that litigation between government and a citizen should not be a matter of "dog eat dog" or "win at any cost". *Shell* v. *State Road Department,* 135 So. 2nd 857, 861. (Fla. Sup. 1962); and it is no part of the duty of a state to a citizen "to attempt to procure his property for less than its reasonable value". *Crist* v. *Iowa State Highway Commission,* 123 N.W.2d 424, 431 (Ia. Sup. 1963).

No decision by this Court defining the duty of government, federal or state, as a litigant in a civil suit has been found. The plight of the Popes is not unique. The cries of the commentators demonstrate that the efforts of various governments to buy cheaply span the nation. The need for

this Court to speak on the duty of the government in court in a condemnation proceeding requires grant of certiorari to review the judgment below.

2. The Decision Below Conflicts in Principle with Brady v. Maryland, etc.

Brady v. *State of Maryland*, 373 U.S. 83 (1963) holds that suppression of evidence favorable to an accused, irrespective of the good faith or bad faith of the prosecution, violates the Due Process Clause. *Gigilio* v. *United States*, 405 U.S. 150 (1972) holds that non-disclosure by the prosecution of evidence material to an accused, whether "a result of negligence or design" is a violation of due process.

Perhaps the rights of an accused and the rights of a condemned owner are not identical, but in principle, the due process duty of government to deal fairly, honestly and aboveboard to a condemned is not less than that owed an accused.

"The United States wins its point whenever justice is done its citizens in the courts." This inscription on the wall of the Department of Justice, noted in *Brady*, does not describe the decision of the court below. The holding that the State of Texas owed no duty to disclose its approved market value in court and that its suppression of the same and presentation of a price equal to 51% thereof (by a witness the Department refused to employ), was not a taking of property without due process of law, squarely conflicts with the principles of *Brady* and *Gigilio*.

The need to settle, once and for all, that the duty of government, federal and state, to a citizen in court is one of fairness and openess, with no non-disclosure or suppression, asks for the grant of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 19th day of July, 1974, three copies of the Petition for Writ of Certiorari were delivered to Mr. Charles Wilson, at his office in the County Courthouse of Harris County, Houston, Texas 77002, counsel for the Respondent. I further certify that all parties required to be served have been served.

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